IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 295.

FRANKLIN S. POLLAK and GUY MARTIN, *Petitioners*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY, and WASHINGTON TRANSIT RADIO, INC., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF PETITIONERS IN NO. 295.

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This case and No. 224, in which the parties are reversed, involve different portions of the radio programs distributed by loudspeakers in the vehicles of Capital Transit Company. No. 224 involves "commercials" and "announcements"; this No. 295 involves all other portions. Petitioners in this case (respondents in the other) make, in the main, the same constitutional objections to all portions. These objections will be set forth at length in our

brief in the other case. This brief does not restate the constitutional basis of the objections but undertakes only to show that, assuming them valid as to "commercials" and "announcements", they are also valid, with one significant qualification, as to the portions involved here—the other portions.

Petitioners in this case believe that in all probability the Public Utilities Commission, Capital Transit Company and Washington Transit Radio, Inc., are correct in asserting that if the commercials are prohibited these programs will stop entirely.[1] It was for that reason that the Petition for Certiorari in this No. 295 was a conditional one, requesting certiorari in this case only if it were granted in the other. But certiorari was sought here, on this conditional basis, because the portions of the programs not prohibited by the Court of Appeals—those involved here—constitute far the largest part of the programs and are open in the main to the same constitutional objections. These petitioners considered it essential that the Court should be presented with the programs as a whole, just as they are presented to the riders as a whole, free of any possible objection that in the absence of a cross petition the Court could take note of only the "commercials" and "announcements".

OPINIONS BELOW.

The opinion and order of the District of Columbia Public Utilities Commission (R. 114) is reported in 81 P.U.R. (N.S.) 122. The opinion of the United States District Court for the District of Columbia (R. 2) dismissing the petition of appeal from the order of the Public Utilities Commission is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the District Court (R. 124) is reported in 89 U.S. App. D.C. —, 191 F. (2d) 450.

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[1] Page 11 of the Petition for Rehearing in Banc in the Court of Appeals (page 143 of the original transcript of record in this Court, not included in the printed transcript); Petition for Certiorari in No. 224, p. 10.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 1, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and the District of Columbia Code, 1940, Title 43, § 705. Certiorari was granted in both No. 224 and No. 295 on October 15, 1951 (342 U. S. 848).

STATEMENT OF THE CASE.

The principal facts of the case are set forth succinctly in the opinion of the court below (R. 124). They will also be set out in the briefs in No. 224.

For the purpose of this No. 295 it is necessary only to state that the judgment of the court below gave to petitioners, Franklin S. Pollak and Guy Martin, less than the full relief to which they were entitled and which they sought before the Public Utilities Commission. Before the Commission they sought an order totally prohibiting the programs in question—words and music alike (Application for Reconsideration, R. 172-173). The Court of Appeals stated in its opinion:

> "This decision applies to 'commercials' and to 'announcements'. We are not now called upon to decide whether occasional broadcasts of music alone would infringe constitutional rights." (R. 130).

The judgment of the Court of Appeals remanded the cause to the District Court with directions to remand to the Commission for further proceedings in conformity with the opinion of the Court of Appeals. The Commission is thus required to prohibit only "commercials" and "announcements". The Commission is not required to prohibit any other spoken parts of the broadcasts, if there are spoken parts not falling within the categories of "commercials" and "announcements" as those terms are used

in the opinion.[2] The Commission is not required to prohibit the musical portions of the broadcasts.[3]

SPECIFICATION OF ERROR.

The court below erred in not holding that all compulsory listening to radio broadcasts in the buses and streetcars of a transit company with a governmentally-fostered monopoly is a violation of constitutional rights of objecting passengers, and in limiting its holding to "commercials" and "announcements".

ARGUMENT.

Petitioners contended before the Commission and in the courts below that constitutional rights are violated by the imposition of forced listening on the passengers of a transit company possessing a governmentally-fostered monopoly. The Court of Appeals agreed, but not to the full extent of the contentions made.

The Court of Appeals laid down the basic propositions that "Freedom of attention, which forced listening destroys, is a part of liberty essential to individuals and to

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[2] As a matter of common understanding, a speech or a sermon would not be within the terms used by the court below. Although such matters have not formed a regular part of the transit radio broadcasts, it is a fact that the speech of General Douglas MacArthur before the United States Congress on April 19, 1951 was carried in its entirety over the transit radio system. This event was subsequent to the argument of this case in the Court of Appeals. There was never an indication to that court, either in the record or in the briefs of the parties, that a speech of any kind would ever be a part of these programs.

[3] The musical portions of the broadcasts are not covered by either the first or second sentence quoted above from the Court of Appeals' opinion. They are not "commercials" or "announcements", to which the Court of Appeals says its decision applies. Equally they are not "occasional broadcasts of music alone", the constitutional status of which the Court of Appeals says it is not called upon to determine: they are not "occasional" and they are not "alone". It seems clear, however, that the first sentence controls and that the musical portions of the broadcasts are not barred by the order below.

society" and that "One who is subjected to forced listening is not free in the enjoyment of all his faculties". (R. 128). If forced listening to "commercials" and "announcements" is therefore an invasion of constitutionally protected liberty, forced listening to a speech, a sermon, a roundtable discussion or an interview would be equally bad. In the circumstances of this case such textual material is as unprotected by the First Amendment as is advertising.

Similarly, broadcasts of music invade freedom of attention. The record clearly shows that music constitutes by far the greater portion of the broadcasts,[4] and that objections made by riders have in many cases been based upon the broadcasts as a whole, without distinction between music and words, or have been directed specifically at the music.[5] The objections make it clear that music, as well as words, infringes liberty in violation of the Fifth Amendment by interfering with the free use of one's faculties.[6]

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[4] See testimony of Norman Reed, R. 140, 142, indicating that no more than six minutes of "announcements" would be made in any one given hour and that, with the possible exception of time devoted to station identification, time announcements and weather reports, "music occupies all the time in between the announcements or newscasts". Mr. Reed was called as a witness by Washington Transit Radio, Inc.

[5] The Public Utilities Commission recognized this in its opinion (R. 114, 117). The "Public Opinion Study" made for Radio Station WWDC-FM and Capital Transit Company shows objections to the broadcasts as a whole (R. 155-156). The chairman of the Public Utilities Commission stated that "a large number of people who profess to be music lovers violently object to music of this type on the ground that it violates their private rights." (R. 81). Washington Transit Radio's witness, Donald O'Neill, program director of the Franchise Division of Muzak Corporation, testified that "the average person has strong likes and dislikes in music. Futhermore, he will accept as a matter of course the music he likes but will protest vigorously that which is personally distasteful. . . . Generally speaking, people with a high musical training do not care too much for the more popular forms of music." (R. 80, 81).

[6] Respondents, Capital Transit Co. et al., appear to have accepted the view that if commercials are unconstitutional the music is too. On page 6, footnote 2, of their joint Petition for Rehearing in Banc, filed in the court below (page 138 of the original transcript of record in this Court, not included in the printed transcript), they

Two further contentions, not reached by the court below but to be developed by us in No. 224, are applicable also to the musical portions of these programs and to any textual portions not covered by "commercials" and "announcements".

We contend that when these programs—words or music—infringe the freedom of attention of objecting riders there is an unconstitutional taking of their property—their attention itself and the free use of their time.

Finally, we contend that these programs abridge the rights of objecting riders under the free speech guaranty of the First Amendment.[7] The "Public Opinion Study" and the opinion of the Public Utilities Commission show that these programs interfere with reading and conversation (R. 155, 156, 117), and the Court of Appeals specifically so states (R. 126, 129). The music, as well as the words, amounts to a "jamming" of the communications which objecting riders wish to make to each other or wish to receive from the books, magazines or newspapers which they are reading or attempting to read.

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said: "The Court has found that 'forced listening' to radio 'commercials' and announcements' deprives objecting passengers of 'liberty' without process of law, but implies that 'forced listening' to music may not so deprive an objecting passenger of 'liberty'. It is impossible to reconcile this rationale that 'forced listening' to one thing violates the Constitution, while 'forced listening' to another does not."

[7] There is one point of difference as to music. One of the objections to be made in No. 224 is that the First Amendment is violated, among other ways, by the drastically favored position given to whatever utterances are addressed to the captive audience—for example, statements defending transit radio itself (R. 163-4, 171-2). That objection is not applicable to the type of music usually broadcast in these programs. But if the broadcasting of General MacArthur's speech over transit radio had been followed by the repeated playing of "Old Soldiers Never Die", this objection would be applicable. Political use of music has been practised frequently in other settings. For example, during World War II, Allied stations frequently broadcast a phrase from Beethoven's Fifth Symphony as a "V for Victory" symbol to encourage Allied sympathizers in occupied Europe.

For these reasons, petitioners contend that all forced listening to transit radio is an unconstitutional interference with constitutionally protected rights, and that the Court of Appeals erred in restricting its holding to "commercials" and "announcements".

Respectfully submitted,

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February 11, 1952.